

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 September 2004

CASE NO.: 2003-LHC-2325

OWCP NO.: 08-116671

IN THE MATTER OF:

EDWARD R. BRAUS,

Claimant

v.

UNITED DIESEL, INC.,

Employer

and

CNA CASUALTY OF CALIFORNIA,

Carrier

APPEARANCES:

James H. Domengeaux, Esq.,

On behalf of Claimant

Robert Davee, Esq.,

On behalf of Employer/Carrier

Before: Lee J. Romero, Jr.
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., (2001), brought by Edward R. Braus (Claimant) against United

Diesel, Inc. (Employer) and CNA Casualty of California (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on February 10, 2004, in Houston, Texas.

At the hearing, each party was represented by counsel and each presented documentary evidence and made oral and written arguments.¹ The following exhibits were received into evidence: Joint Exhibits 1-7, Claimant's exhibits 1-4 and 6-14, and Employer's exhibits 1-17.² This decision is based on the entire record.

I. STIPULATIONS

Prior to the hearing, the parties entered into joint stipulations of fact and presented unresolved issues as follows:

1. An accident occurred in September 1998;
2. The accident was not in the course and scope of Claimant's employment;³
3. An employer-employee relationship existed at the time of Claimant's accident;
4. Employer was advised of the injury to Claimant's elbow in September 1998;
5. Employer did not file Notice of Controversion;
6. An informal conference was held on March 25, 2003;
7. Claimant reached maximum medical improvement in October 2000;
8. Claimant suffered permanent total disability;

¹ Post-hearing briefs were filed by the parties on May 19, 2004.

² References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX __, p.__; Employer exhibits- EX __, p.__; Joint exhibits- JX __, p.__.

³ The parties agree that Claimant's elbow injury was work-related, however Employer/Carrier dispute causation of Claimant's alleged post-traumatic stress disorder.

9. Employer paid Claimant temporary total disability from March 26, 1999, to October 9, 2000 and temporary partial disability from October 10, 2000 to the present and continuing. Employer paid a total of \$207,436.26 in disability compensation, representing 248 weeks at \$835.74 per week.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Causation of Claimant's alleged psychological injuries;
2. Claimant's average weekly wage;
3. Section 8(f) Special Fund Relief.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant testified by deposition on December 4, 2003. He was also deposed on October 17, 2001, in connection with a third party suit, which deposition has been admitted into evidence over Employer/Carrier's objection.

Claimant graduated from Acadiana high school in 1978 and Gulf Area Vocational Technology School in 1982, with training in diesel mechanics. He also received training in large bore master mechanics at the Caterpillar Center in Peoria, Illinois. Upon graduation in 1982, Claimant went to work for Sea Coast productions as a marine mechanic. All of his work was with Detroit Diesel engines and performed on vessels; however, Claimant was never promoted to supervisor. (JX-2, pp. 9-11). In 1990 he went to work for Employer for a chance to make more money and have an opportunity to advance. Claimant testified he was hired as a diesel mechanic, and was promoted to service manager in 1994. As service manager, Claimant was responsible for supervising other mechanics and handling customer complaints. He testified that the stress levels of being a mechanic and being a service manager were roughly the same, although different in character. (JX-2, pp. 12-18).

In 1994, Claimant's mother passed away after a six-month battle with cancer. Claimant testified this was very difficult for him to handle emotionally, as he was quite close with his mother. None of his six brothers and sisters was treated for emotional or psychological problems secondary to their mother's passing. However, Claimant did state that his sister suffered a brain aneurysm in 1994, requiring brain surgery. He testified this was emotionally stressful on the entire family. (JX-2, pp. 42-51). Following these events, Claimant began experiencing suicidal thoughts and severe depression. He started treating with Dr. LeBouef in 1994, who prescribed Prozac and Xanax secondary to stresses related to Claimant's work and experiences with his mother and sister. Dr. LeBouef also prescribed Claimant medication for his high blood pressure. (JX-2, pp. 54-55, 73, 89-93).

In 1995 Claimant decided he wanted to return to mechanic work, so he left Employer and went to Baker Oil Tools, an offshore service company, as a marine mechanic.⁴ He worked with Series 149 Detroit Diesel marine engines. Claimant was required to go offshore a few times, but most of his work was performed in the yard at Broussard, Louisiana. Claimant was eventually promoted to operations manager at Baker, which involved additional duties of overseeing the work of fifteen mechanics, as well as two hundred pieces of equipment valued at approximately \$15 million. (JX-2, pp. 23-30).

In 1997, Claimant's father suddenly passed away in his sleep. Claimant testified this was not a particularly emotional or stressful event. On the contrary, Claimant stated he was envious that his father went so quickly. (JX-2, pp. 53-54).

Claimant returned to Employer in January 1998 as a regular marine mechanic. His work was evenly split between vessels and the shop, and he had no complaints about his supervisor, Pat Blakesley. Claimant testified his supervisors and co-workers knew he was on Prozac, and that he did not try to hide it from them. (JX-2, pp. 36-42, 101-02).

⁴ Claimant testified Employer refused to move him to a mechanic's position because they did not have anyone to replace him as service manager. Employer moved Claimant to the truck mechanic department, but after one year he left to find work as a marine mechanic. (JX-2, pp. 20-23, 70).

Claimant testified he was working in Employer's New Iberia shop on September 6 or 7, 1998, when Mr. Livesay called him about a job repairing a PTO on the GULF ISLAND V, a jack-up rig approximately 20 miles offshore. Claimant had experience working on similar engines, and as this was a one-man job, he gathered his tools and drove to Matagorda Bay, Texas.⁵ (JX-1, pp. 32-39). Claimant testified the skies were clear when he left New Iberia, but the weather at Matagorda Bay was gloomy and overcast when he arrived; he was not aware of the weather conditions in the Gulf of Mexico. Immediately upon arrival at Matagorda Bay, Claimant departed for the GULF ISLAND V on a small supply boat. On the one-hour trip out and during his time on the jack-up rig, the seas were constantly rough, with 8-12 foot waves. Id. at 41-45.

Upon arrival at the GULF ISLAND V, Claimant spoke with the captain, Tommy Falgoust, who informed him there was a hurricane headed in their direction. Mr. Falgoust also explained he needed a hydraulic mechanic in addition to Claimant to fix the fouled jacking mechanism. Attempts to secure a hydraulic mechanic were futile, as the company refused to send anyone out in the storm, so Claimant attempted the repairs. (JX-1, pp. 47-48, 69). Upon inspection, Claimant believed the clutch within the PTO engine needed to be replaced. As he did not have the proper tools with him, they had to be shipped out by Employer and did not arrive until 10 hours after Claimant first reached the jack-up. Id. at 49-55, 57. While he waited, Claimant trouble-shot the hydraulic system but did not find anything wrong. The crew members remained in the galley and sleeping quarters to avoid the weather. Claimant testified a lot of the crew members complained about the weather conditions and wanted to go home. Id. at 60-62.

As Claimant repaired the PTO with the new parts, the weather worsened and the seas climbed to 15 feet. Waves were hitting the deckline and crashing over the rail. Claimant testified the GULF ISLAND V was jacked-up nine feet out of the water, but when he tested the repairs it fell two more feet. (JX-1, pp. 57, 65-66). Repairing the clutch did not help the hydraulic system, and Claimant was instructed to assist in a second troubleshooting of the hydraulic system; this time, the hydraulic mechanic provided guidance via radio. Claimant

⁵ Claimant testified he was told the engine was a SP-111 PTO, but in actuality it was a SP-211 PTO and he therefore did not have the correct parts with him on his first trip out to the jack-up rig. (JX-1, pp. 36-37).

testified no one on board seemed familiar with the system, including himself. Id. at 69-73. Claimant testified he switched out a pump from the bow-thruster in an attempt to fix the problem, injuring his elbow in the process. He testified the crane operator witnessed this accident, but Claimant did not report it to anyone on the GULF STREAM V, because Employer's company policy was to not discuss injuries until reported to one's immediate supervisor. (JX-1, pp. 79, 81-84). Claimant further testified the impending hurricane did not impede his physical ability to work, but "ate him up" inside and caused him to hurry through the repairs. Id. at 99.

After five hours of troubleshooting, Claimant and the crew could not locate the problem or properly repair it. Subsequently, Mr. Falgoust called "abandon ship." Claimant testified that at the time winds were around thirty-five miles per hour, with gusts of seventy miles per hour, and the seas were at approximately twenty feet. (JX-1, pp. 80, 88). Mr. Falgoust contacted Amoco and the Coast Guard, but nobody was willing or able to rescue them, according to Claimant's testimony. Id. at 93-96. Finally, the GULF FLEET 53, an offshore supply boat, responded to Mr. Falgoust's distress calls and rescued the crew of the GULF ISLAND V the following morning. The rescue boat did not arrive until 10 hours later, approximately 25 hours after Claimant arrived on the jack-up. During that time, Claimant and the crew were placed on stand-by orders to abandon ship. Mr. Falgoust commented the weather was the worst he had seen. Claimant testified he called his boss and his wife because he thought he was going to die; his boss thought Claimant was joking. Id. at 118-27.

The transfer to the GULF FLEET 53 was uneventful, and no one was injured.⁶ Claimant testified he was sea-sick the entire ride in, and once onshore he gathered his belongings and immediately drove back home. (JX-1, pp. 101-06). The next morning he informed Mr. Blakesley, his supervisor, about his injury, the weather problems, and that he would no longer go offshore. Claimant performed his regular duties fixing engines on the docks, and passed any offshore jobs along to his co-worker, Mr. Christianson. Id. at 157-58.

Since the offshore incident, Claimant has suffered depression, anxiety, and suicidal thoughts. He took time off to treat with Dr. Aurich, a psychologist, because he was having

⁶ The GULF ISLAND V reportedly capsized at 8:55 p.m. September 9, 1998. (EX-5, p. 4).

crying spells every afternoon. Eventually, the emotions festered in his mind and "blew up"; specifically, he cried a lot, was anxious and could not sleep. Everyday noises of equipment starting up, air compressors, people shouting and hammering all reminded him of what happened offshore. About six months after Claimant's offshore incident, he stopped doing repair work secondary to feelings of paranoia, anxiety and claustrophobia which caused him to become clumsy in his work. Claimant was transferred to a position cleaning floors before Dr. Aurich wrote him a medical release excusing him from all work. (JX-1, pp. 157-71; JX-2, pp. 57-59).

After September 1998, Claimant gained eighty pounds, deteriorated physically, and stayed away from people and stores. (JX-1, p. 217). Water made him anxious and nervous; a trip across the Causeway Bridge to New Orleans triggered these emotions, and at his deposition he requested pictures depicting maritime scenes be removed from the wall. Claimant testified his emotional and psychological problems kept him from obtaining and maintaining gainful employment. Although his depression resolved around 2002, he continued to have constant feelings of anxiety and nervousness. (JX-2, pp. 8, 61-65, 113).

Claimant clarified his elbow injury required outpatient surgery, but healed without any residual disability. Since leaving Employer in March 1999, he has treated with Dr. Aurich, Dr. Gad and Mr. Kimball, a social worker, for his psychological problems. He was on regular doses of Effexor, Klonopin, Gabitril, Remeron, Ambien and Nexium for his depression, anxiety and acid-reflux. (JX-2, pp. 65-66, 76-84). Claimant testified he continued to see Dr. LeBouef for his sinuses and general medical problems, but not for his psychological issues; Dr. LeBouef retired in the fall of 2003. Id. at 73-76. Claimant further stated he was receiving workers' compensation and Social Security disability benefits secondary to post-traumatic stress disorder (PTSD). (JX-2, pp. 116-17).

Debra Ann Segura Braus

Mrs. Braus testified by deposition on December 4, 2003. She is Claimant's wife of twenty years and has lived with him the entirety of their marriage. Specifically, Mrs. Braus lived with Claimant in 1994 when his mother passed and his sister suffered an aneurysm, as well as during the 1998 GULF ISLAND V incident. Mrs. Braus saw Claimant on a daily basis and was aware of his deteriorating mental and physical condition. Mrs. Braus was aware of Claimant's doctor appointments, and attended

each of his appointments with Dr. Gad and Mr. Kimball. (JX-3, pp. 3-6).

Mrs. Braus testified the death of Claimant's mother was an emotionally significant event in his life for which he had difficulty coping. He also was emotionally affected by his sister's brain surgery. Both of these events placed him under significant stress. Mrs. Braus testified Claimant's stress manifested into depression, more than anxiety, for which he sought treatment from Dr. LeBouef. Specifically, she testified he had crying spells, difficulty coping, insomnia and suicidal thoughts. However, she also testified Claimant's stress and anxiety prior to September 1998 was not severe. Claimant was on Prozac to control these problems. (JX-3, pp. 8-11).

Claimant described to his wife the emotional stress he experienced while on the GULF ISLAND V. She testified he suffered psychological problems since the accident. Mrs. Braus further testified Dr. Gadd related Claimant's depression and anxiety to his experience aboard the GULF ISLAND V. (JX-3, pp. 12-14). Mrs. Braus stated Claimant's mental and emotional condition has been constant since 1999 and she does not know when, if ever, it will resolve. Claimant has not had any meaningful improvement of his condition. Id. at 16-17.

Malcolm P. Blakesley

Mr. Blakesley testified by deposition on February 9, 2004. He is the foreman at Employer's New Iberia shop, and was Claimant's supervisor in 1998. As foreman, Mr. Blakesley testified he was familiar with the office documentation and record keeping process, specifically the invoices and field orders submitted for each job. He explained he was responsible for filling out the top portion of the field repair orders which were then signed by the mechanic who completed the job. (JX-6, pp. 5-8).

Mr. Blakesley was questioned extensively about approximately fifty to sixty jobs Claimant performed between September 1998 and February 1999, as recorded in various invoices and field repair orders. Mr. Blakesley testified all of the work performed by Claimant was mechanical work in the engine rooms of various types of vessels. A vast majority of the vessels Claimant worked on were docked, either in the water or on dry-docks. However, on cross-examination, Mr. Blakesley testified he was not present at Claimant's job sites and could not say whether the vessels were in the water or not. He

clarified that some of the tests Claimant ran on the vessels would have required the vessel to be in the water for cooling purposes, but Mr. Blakesley could not say how far out the vessel was located in the water. (JX-6, pp. 13, 45-47). Two entries described work Claimant did offshore in November and December 1998; each entry had travel time to the off-shore vessel and one indicated Claimant traveled by helicopter. (JX-6, pp. 19, 34, 47).

Mr. Blakesley also testified it was well-known by workers in the shop that Claimant was on Prozac. However, Claimant never complained about his ability to perform his job until March 1999, when he informed Mr. Blakesley that he felt the engine rooms closing in on him. Mr. Blakesley further testified that around the same time, March 1999, he noticed Claimant withdraw from other employees. He even saw Claimant break down into a crying spell on one occasion. Mr. Blakesley clarified he would not have assigned Claimant to work in engine rooms if he knew they made Claimant anxious. Further, he did not know the conditions under which Claimant left Employer. (JX-6, pp. 37-44).

MEDICAL EVIDENCE

Dr. Corbett LeBouef

Dr. LeBouef was Claimant's general practitioner until his retirement in 2001. His medical records indicate he began treating Claimant in 1995 for stress related to work, his mother's passing and sister's health problems. On June 19, 1995, Claimant presented with depression, stress and insomnia. Dr. LeBouef prescribed Effexor and gave Claimant a medical release from work. Claimant's symptoms were unchanged in September 1995; Dr. LeBouef also noted memory loss and prescribed Prozac at this time. Dr. LeBouef's records indicated he refilled the Prozac prescription on various occasions through April 1997. (EX-8, pp. 12-14).

On August 6, 1997, Claimant presented with complaints of stress, insomnia, anger moods and indigestion for which Dr. LeBouef prescribed Prozac and Xanax. On January 7, 1998, Claimant appeared nervous, shaky and dizzy. Dr. LeBouef continued to treat Claimant through September 1998, prescribing Prozac for his depression, Silvadene, Cipro and Lomofil. On September 25, 1998, following Claimant's offshore accident, Dr. LeBouef diagnosed him with left elbow bursitis with effusion. (EX-8, pp. 14-15).

Claimant continued to complain of depression, general malaise and sinus problems through November 1998. Dr. LeBouef repeatedly prescribed Prozac for Claimant. On March 19, 1999, Claimant described his "near death" offshore experience to Dr. LeBouef, who noted Claimant suffered paranoia at water and prescribed Prozac. (EX-8, pp. 16-17).

Dr. Lynn Aurich, Ph.D.

Dr. Aurich, a psychologist, first treated Claimant on March 4, 1999, when he presented with significant anxiety, fear and depression secondary to an offshore incident in which his vessel sank due to heavy seas. Claimant informed Dr. Aurich the crew was rescued just before having to abandon ship and he has since developed specific fears and phobia related to water and ships. Dr. Aurich noted Claimant's symptoms were consistent with PTSD. (CX-13). Dr. Aurich treated Claimant on a weekly basis with behavior and supportive therapy, as well as psychotropic medications.⁷ In May 1999, Claimant was depressed about working in the shop, which he felt was a demotion, and reported significant sleep disturbances. On May 20, 1999, Claimant informed Dr. Aurich that diesel engines at work triggered flashbacks of the storm and GULF ISLAND V sinking. He also indicated he worked in a hostile environment; Claimant felt his co-workers purposely caused him to have anxiety attacks. Dr. Aurich noted numerous work events caused Claimant's fear and anxiety, which furthered his depression. (CX-13).

In June 1999, Claimant expressed depression and anxiety related to being terminated from work and having to file bankruptcy.⁸ He consistently exhibited flat affect and depressed mood as well as PTSD as evidenced in his startle reactions, dreams and intrusive thoughts related to the GULF ISLAND V incident. Dr. Aurich performed psychological testing and evaluations in June and July 1999, which revealed water, boats and loud noises, triggered Claimant's flashbacks and he also suffered passive suicidal ideation, depressed mood, anxiety and hallucinations. The MMPI-II resulted in a valid profile with a

⁷ The medications were prescribed to Claimant by his general practitioner, Dr. LeBouef. (CX-13).

⁸ Claimant testified he left Employer in March 1999, but his personnel records from Employer indicate he was terminated on December 12, 1999. (EX-6, p. 11). Claimant's wage records from Employer indicate he was last paid for the week of June 12, 1999, which is consistent with Dr. Aurich's records Claimant was terminated in June 1999. (EX-24, p. 2).

number of psychological problems, a high degree of stress and a fluid psychotic process. Additionally, the Beck Anxiety and Depression Inventories were severe and consistent with the MMPI-II. Based on these tests and evaluations, Dr. Aurich diagnosed Claimant with PTSD, and indicated schizoaffective disorder needed to be ruled out. She referred Claimant to Dr. Gad for further psychiatric treatment. (CX-13).

Claimant's mental condition continued to worsen in July and August 1999. He reported difficulty with controlling his thoughts and reliving the incident. Claimant was also unable to drive or bathe without experiencing anxiety and hallucinations. This continued into 2000 when Dr. Aurich noted Claimant suffered nightmares three to four times per week, in which the themes involved boats. (CX-13).

Dr. Sarwat Gad

Dr. Gad testified by deposition on February 2, 2004. He is board-certified in psychiatry, with eighty percent of his practice in clinical psychiatry. Dr. Gad first treated Claimant in May 1999 on a referral from Dr. Aurich, a psychologist. Claimant presented with complaints of insomnia and anxiety stemming from the 1998 boat incident in which he was trapped in a boat offshore during a hurricane. (JX-4, pp. 5-9). Claimant informed Dr. Gad he had not been able to function since the 1998 incident; specifically, he was afraid of weather changes, could not sleep or fish, was unable to take care of himself and his family, and experienced shortness of breath when he bathed. Dr. Gad reported Claimant was outgoing, generous with his time and talents and at ease with meeting new people prior to the offshore incident. Although Claimant suffered depression since 1994, he was able to function normally prior to September 1998. (JX-4, pp. 8, 19, 27).

At the initial evaluation on May 4, 1999, Dr. Gad noted Claimant had been on Prozac for four years, was depressed, had a fear of water, bridges and being trapped which affected his work and joy of fishing. Claimant stated he visualized the GULF ISLAND V when he bathed. He also suffered anxiety and palpitations, and Dr. Gad noted evidence of phobias and obsessive thoughts. Dr. Gad diagnosed Claimant with major depressive disorder without psychotic features, agoraphobia and PTSD. (EX-12, pp. 63-66). Throughout the rest of 1999, Claimant continued to treat with Dr. Gad and experience a fear of bridges and traffic. Claimant also continued to have visual and auditory hallucinations. Id. at 59-61.

In February 2000, Dr. Gad admitted Claimant to a hospital program at Options Management, LLC. Claimant's chief complaint was of nervous disorder and depression, although he also reported hallucinations and expressed feelings of paranoia. (EX-11, pp. 28-33). Following his hospitalization, Claimant's condition continued to deteriorate and he reported hearing noises, experiencing nightmares, fear of water as well as symptoms of paranoia and anxiety. Claimant informed Dr. Gad that rain and storms triggered his anxiety attacks as well as visual hallucinations of the GULF ISLAND V sinking. Claimant was again hospitalized in July 2001, where he was diagnosed with major depression with psychotic features, PTSD and agoraphobia. (EX-12, pp. 25-48). Throughout the remainder of Dr. Gad's treatment of Claimant, through February 4, 2003, Claimant continued to experience anxiety triggered by storms and crowds of people; depression; insomnia; nightmares; fear of water, bridges and sleeping; memory loss; paranoia that people are watching him and out to get him; visual hallucinations of the GULF ISLAND V sinking; and auditory hallucinations of his supervisors and co-workers berating him for refusing to go offshore. Id. at 10-24.

Dr. Gad conducted clinical psychiatric testing of Claimant and various mental status exams. He has prescribed a variety of medication in an attempt to control Claimant's anxiety and phobias, including Effexor, Gabitril, Remeron and Klonopin. (JX-4, pp. 14-16).

Dr. Gad testified he diagnosed Claimant with post-traumatic stress disorder (PTSD) with co-morbid panic disorder, major depression and generalized anxiety disorder. Dr. Gad stated the incident offshore in 1998 was a stressful event which triggered Claimant's PTSD. (JX-4, p. 68). Dr. Gad testified Claimant met all the criteria for PTSD. Claimant had a confrontation with events involving actual or threatened death, as evidenced by being trapped on the GULF ISLAND V in hurricane weather. Claimant persistently re-experienced the event in dreams, nightmares and stress. Claimant avoided stimuli associated with the event, as he stayed away from water to the point where he had a phobia of bathing. Finally, Claimant had persistent symptoms of increased arousal which was not present before the trauma. Dr. Gad emphasized that as there was no other traumatic event in his life, Claimant's PTSD was more likely than not related to the 1998 incident on the GULF ISLAND V. (JX-4, pp. 23-26).

Dr. Gad further testified Claimant's PTSD was permanent and severe, requiring hospitalization and outpatient therapies. Little progress was made during Dr. Gad's treatment of Claimant from May 1999 and continuing; in March 2003, Dr. Gad was still attempting to control Claimant's symptoms and questioned his ability to return to work. He opined Claimant was permanently disabled and in need of long term intensive psychiatric treatment. (JX-4, p. 12). He explained Claimant still suffered insomnia, and was afraid of sleeping because of the dreams he experienced. Claimant also continued to have a fear of water and could not cross bridges calmly or bathe himself more than two times per week. Claimant also informed Dr. Gad he could not leave the house without having a panic attack, and has difficulty driving in traffic because he feels trapped in by other cars. Id. at 34-36. In April 2003, Dr. Gad noted Claimant had difficulty concentrating and appeared disheveled and unkempt. In August 2003 his sleep disturbances were increasing, and in November 2003 his nervousness was more pronounced. Claimant reportedly bought weather equipment to track hurricanes, and arrived at his December 2003 appointment with Dr. Gad in a life jacket. Id. at 37-38.

Dr. Gad stated PTSD commonly results in anxiety disorder, and can lead to agoraphobia and depression. He also testified severe PTSD can have psychotic characteristics. However, Dr. Gad testified he did not agree with Dr. Culver's diagnosis of schizo-affective disorder, in light of the acute, traumatic event of 1998 and Claimant's severe anxiety. (JX-4, pp. 28-33; CX-12, p. 29).

On cross-examination, Dr. Gad testified he did not treat Claimant between September 1998 and May 1999. Thus he had no first-hand knowledge of Claimant's mental condition and relied solely on the history provided by Claimant and his wife. Dr. Gad noted Claimant suffered depression and mood disorder prior to 1998, and was prescribed Prozac and Effexor for this condition. He also stated family physicians commonly over-prescribed Prozac in the 1990's. Dr. Gad further testified depression can develop over days, weeks or even months; it can be permanent or progressive and psychotic or not. (JX-4, pp. 42-54; CX-12, p. 64).

Dr. Gad acknowledged that different people possess different ranges of mental and emotional coping abilities, explaining that Claimant's past psychological problems made him uniquely vulnerable to a significant stressor. Specifically, Claimant was pre-disposed to exacerbation of his depression.

Dr. Gad testified Claimant suffered severe depression in addition to PTSD, following the 1998 offshore incident. He explained it is common for people to suffer both conditions, as major depression is a differential diagnosis of PTSD. Dr. Gad testified the number of depressive episodes a person experiences increases the likelihood of developing subsequent major depressive episodes. (JX-4, pp. 61-71, 79-87).

Dr. Gad also testified there was a big difference between Claimant's pre-1998 depression, of which he admittedly did not know the severity, and his mental condition following the September 1998 offshore incident. Specifically, Claimant was functioning, working, leading a normal life and providing for his family up until September 1998. After the incident, he rapidly declined to the point he has a fear of bathing. (CX-12, pp. 37-38, 66).

Finally, Dr. Gad testified electroconvulsive therapy (ECT) is not ideal for treating PTSD, although it can be effective for PTSD/complicated depression with suicidal ideation. (JX-4, p. 72).

Mr. Daniel Kimball, MSW, LCSW

Claimant was referred to Mr. Kimball, a certified social worker, following his hospitalization in February 2000. Mr. Kimball first met with Claimant on March 10, 2000, noting a prior diagnosis of major depressive disorder, recurrent and severe with psychotic features, and PTSD. Claimant presented with flat affect, anxious and depressed mood, low energy levels, loss of interest, hopelessness, negativism as well as sleep and appetite disturbances. Claimant also suffered paranoia and heard voices of his crew members and captain from the GULF ISLAND V. (EX-17, pp. 1-3, 21).

Mr. Kimball met with Claimant on a regular basis throughout 2000 and 2001. Claimant continued to suffer depression, anxiety, and visual and auditory hallucinations related to the trauma on the GULF ISLAND V. Specifically, Claimant visualized the vessel sinking and the entire crew drowning, and he heard the voices of the crew and captain. He also heard his supervisors berate him for refusing to go offshore. Claimant reported having nightmares of drowning. He informed Mr. Kimball that engine noises, rain, thunder and lightening trigger his anxiety and flashbacks. (EX-17, pp. 5-14).

Mr. Kimball reported Claimant made slow incremental progress during treatment. On August 9, 2002, Mr. Kimball documented Claimant's constricted affect, hypervigilance, anxiety, rambling speech, depressed mood, fear of stairways, rapid breathing and agitation from traffic. Claimant's depression and anxiety continued, and in January 2003 he had difficulty concentrating and focusing. Mr. Kimball also noted his speech was slow and pressured. Claimant experienced hallucinations in May 2003, and in September 2003 reported what Mr. Kimball termed bizarre delusional behavior, in which the ground appeared to cave in all around him while he was mowing the lawn. In December 2003, Claimant wore a life vest to his appointment with Mr. Kimball. In January 2004, Claimant reported wearing the life vest everywhere he went for safety. (EX-17, 22, 27, 36-41, 52-57).

On January 19, 2004, Mr. Kimball indicated Claimant's condition was still major depression, recurrent and severe with psychotic features and PTSD. He noted Claimant does not drive anymore, as he has tendencies toward losing control and anger, and feels violence might erupt if he drives. (EX-17, pp. 54-55).

Dr. Lyle L. LeCorgne, Ph.D.

Claimant submitted an undated report issued by Dr. LeCorgne, a clinical psychologist, as CX-14. Dr. LeCorgne diagnosed Claimant with PTSD and major depressive disorder not otherwise specified. He also indicated Claimant had significant occupational and psychosocial stressors, a work disability and assigned him a current Global Assessment of Functioning (GAF) of 40, indicating major impairment in social, family and occupation functioning. Dr. LeCorgne stated Claimant met all of the criteria of PTSD "and evidences ongoing distress from the event he experienced on September 9, 1998." (CX-14). Moreover, Claimant was coping poorly, withdrawn, isolated and heavily dependent on others. He issued a guarded prognosis for Claimant's improvement and recommended continued psychotherapeutic interventions, medication management and possibly hospitalization. Id.

Dr. Rennie Culver

Dr. Culver is a board-certified psychiatrist who evaluated Claimant at Employer/Carrier's behest on October 9, 2000, and March 25, 2003. Dr. Culver testified by deposition on January 13, 2004. (JX-5, pp. 4-7).

At the October 9, 2000 evaluation, Dr. Culver diagnosed Claimant with major depressive disorder with mood incongruity, psychotic features, and possibly schizoaffective disorder with personality disorder. In March 2003, Dr. Culver's diagnosis of Claimant changed to personality disorder without depression and basic schizophrenia, sub-type schizoaffective disorder; he noted a "disintegration of personality and progressive loss of contact with reality." (JX-5, pp. 17-19). Specifically, Dr. Culver found Claimant maintained abnormal distances from people, experiences delusions and hallucinations and employed an abnormal thought process. Claimant further exhibited abnormal affects, loose associations, and an inability to think abstractly. Id. at 19-21.

At the 2000 evaluation, Dr. Culver noted Claimant heard noises at work similar to the sound of waves crashing on a boat, he felt the engines were screaming at him as if they were going to kill him, and he heard waves crashing when he bathed. Claimant reported dreams of drowning in which the sea had evil eyes. During a mental status exam, Dr. Culver noted Claimant exhibited signs of paranoia and felt as if people were watching him and wanted to hurt him; specifically, Claimant believed Employer intentionally sent him offshore in the middle of a hurricane. Dr. Culver further noted Claimant did not drive because he envisioned cars cutting him off, and Claimant also adopted a dog to protect him from people trying to get him. Dr. Culver noted the paranoia and hallucinations were psychotic and delusional in nature, consistent with schizophrenic disorder. (JX-5, Exh. 2, pp. 4-9, 17-18).

Dr. Culver testified Claimant's extreme anxiety and depression, dating back to 1994, could have been early signs of schizophrenia. Dr. LeBouef's notes in 1995 documented the beginning of a progressive mental illness. Dr. Culver explained Claimant's grief following his mother's death should not have lasted more than one year. However, Claimant's grief lasted multiple years, which indicated to Dr. Culver that other things were going on in his life, or the depression was part of a schizophrenic process. (JX-5, pp. 26-33). Dr. Culver further explained schizophrenics often lack internal structure. Thus, Claimant's employment history, in which he requested to be demoted on two separate occasions, is consistent with a diagnosis of schizophrenia to the extent he needed structure and experienced anxiety involved with assuming responsibilities. Id. at 36-37.

In March 2003, Claimant presented with similar symptoms of anxiety, nervousness, crying spells and insomnia. Dr. Culver noted Claimant's condition had deteriorated since October 2000, and his symptoms were consistent with a schizophrenic diagnosis which probably pre-existed the offshore incident. Dr. Culver testified Claimant most likely reached maximum medical improvement in the fall of 2000, to the extent that his mental condition was of a lasting and indefinite duration. Additionally, his condition impaired his interpersonal relationships as well as his ability to keep and retain employment. (JX-5, pp. 44-48).

Dr. Culver did not dispute that Claimant experienced a traumatic, stressful event in September 1998. However, he indicated it drew attention from the underlying process of emotional disintegration which had been going on for years beforehand. Dr. Culver also acknowledged that anxiety and depression were overlapping symptoms of schizophrenia and PTSD. He further testified Claimant's fear of noises could be audio hallucinations or just a hyper-sensitivity to sound. Dr. Culver also stated in a letter dated April 21, 2003, that the cause of schizophrenia is not known. However, Dr. Culver testified the MMPI-II test revealed Claimant had a decompensation of personality with psychotic process, not PTSD. (JX-5, pp. 61-64, 76, 80; JX-5, Exh. 4). Further, Dr. Culver testified PTSD is not necessarily an accurate diagnosis given Claimant's insomnia and depression for years prior to the 1998 offshore incident, and the subjectivity of the diagnosis itself. Moreover, Dr. Culver noted Claimant appeared saddened by the offshore incident, not frightened, and he did not have the proper flashbacks to support the PTSD diagnosis. Overall, the multiplicity of Claimant's symptoms indicated to Dr. Culver that he suffered a more serious mental condition than PTSD. (JX-5, Exh. 2, pp. 16-20).

Although Claimant had not been diagnosed with schizophrenia prior to 1998, Dr. Culver emphasized that Claimant's symptoms of anxiety, stress, crying and suicidal thoughts, as recorded by his doctors between 1994 and 1998, were consistent with schizophrenic disorder. Id. at 91-92. Dr. Culver indicated it was difficult to draw a line of demarcation between Claimant's current and past psychiatric problems. He opined Claimant was disabled from work secondary to his mental condition. (JX-5, Exh. 2, p. 18; JX-5, p. 84).

VOCATIONAL EVIDENCE

Mr. Glenn Hebert

Mr. Hebert, a vocational rehabilitation counselor, met with Claimant in 2002 to perform vocational services. Mr. Hebert took Claimant's vocational, educational and family history, and reviewed his medical records. In a report dated March 13, 2002, Mr. Hebert stated Claimant does not have the ability to do any type of substantial gainful activity, for the remainder of his adult life, as based on his psychological condition. (CX-5).

THE MARINE REPORTS

The Report of Marine Accident, Injury or Death was submitted as Employer's Exhibit 2. Dated on September 9, 1998, the report listed a fuel leak, capsizing, foundering or sinking, heavy water damage and equipment failure secondary to the eighteen to twenty foot seas from Tropical Storm Frances as elements of the casualty. The form indicated the vessel was stationary and the crew was evacuated, as the "build up of seas impacted on hull of vessel." (EX-2, pp. 1-2).

Reports from the Weather Research Center were also submitted into evidence, although narratives by Ed Roy, Ltd., based on the reports were excluded from evidence. (Tr. 9). The weather records themselves revealed that on September 5, 1998, there were no marine advisories. There was mention of a tropical wave possibly moving into the Central Gulf of Mexico, but development was unclear. On September 7, 1998, the tropical wave moved into the Bay of Campeche, with moderate winds and high seas. A small craft advisory was issued on this date. On September 8, 1998, the day of Claimant's evacuation from the GULF ISLAND V, the weather service reported significant wave heights, but maintained a "wait and see" attitude with respect to the tropical disturbance. (EX-3, pp. 1-13). Tropical storm warnings were issued on September 9, 1998, the same day the GULF ISLAND V capsized. Reported conditions included strong winds, high seas, strong swells and squall-like thunderstorms. Id. at 17.

CONTENTIONS OF THE PARTIES

Claimant contends the September 1998 incident aboard the GULF ISLAND V constituted a traumatic and stressful event which caused significant psychological problems. Specifically, Claimant asserts he suffers from post-traumatic stress disorder,

major depression and anxiety which render him permanently and totally disabled from gainful employment. Claimant contends the opinions of Dr. Gad, Dr. Aurich and Mr. Kimball should be given greater weight than those of Dr. Culver, as the latter was not Claimant's treating physician and was not qualified to give opinions in the area of forensic psychiatry. Although Claimant acknowledged he was prescribed Prozac between 1995 and September 1998 by his general practitioner, he emphasized he was never referred to, or treated by, a mental health professional. As such, Claimant contends his PTSD, depression and anxiety are directly related to the GULF ISLAND V incident offshore.

Employer/Carrier contend Claimant suffers from schizo-affective disorder or major depressive disorder, which pre-existed the September 1998 incident aboard the GULF ISLAND V, and not post-traumatic stress disorder. Employer/Carrier assert Claimant's mood disorder, which included anxiety, nervousness, insomnia and crying spells, dates back to 1995 and is an element of both major depressive disorder and schizo-affective disorder. Employer/Carrier further argue Claimant exaggerated the events of September 1998 and continued to work in vessels and offshore without complaint for seven months following the incident. As such, they assert his current psychological problems are the natural progression of his pre-existing condition and were not triggered by the September 1998 incident.

In the alternative, Employer/Carrier petitioned for Section 8(f) relief, contending Claimant's current psychological condition is an aggravation of his pre-existing depression and anxiety. They assert that Employer was aware of Claimant's disability, which need not be economic in nature under Section 8(f). Employer/Carrier further contend that Claimant's disability was manifest and there was a potential for discrimination. As such, Employer/Carrier argue they have fulfilled the requirements set forth in Section 8(f) and are thus entitled to Special Fund Relief.

The Solicitor contends Claimant's present psychological condition was caused solely by his incident aboard the GULF ISLAND V and thus Employer/Carrier is not entitled to Special Fund Relief. Specifically, the Solicitor argues Claimant did not suffer a pre-existing psychological disorder as he was only prescribed Prozac from 1997-1999, was never treated by a mental health professional and was never diagnosed with a mental disorder before 1999. It contends Employer/Carrier has not proven that a pre-existing condition made Claimant's condition "materially and substantially greater" than the offshore

incident alone. The Solicitor further contends Claimant's pre-injury condition does not constitute a permanent impairment under Section 8(f) as it was not medically cognizable or serious enough to motivate Employer to terminate him. The Solicitor also contends any pre-existing condition Claimant may have had was not manifest to Employer, as there were no medical records documenting the condition. Thus, the Solicitor argues Employer/Carrier is not entitled to Section 8(f) Special Fund Relief.

IV. DISCUSSION

A. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. Staffex Staffing v. Director, OWCP, 237 F.3d 404, 406 (5th Cir. 2000), on reh'g, 237 F.3d 409 (5th Cir. 2000); Wright v. Connolly-Pacific Co., 25 BRBS 161, 168 (1991). The Act presumes that a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary.⁹ 33 U.S.C. § 920(a). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); Director, OWCP v. Greenwich Collieries, supra.

(1) The Section 20(a) Presumption - Establishing a Prima Facie Case

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical or psychological harm or pain; and (2) an accident

⁹ This is not to say that the claimant does not have the burden of persuasion. To be entitled to the Section 20(a) presumption, the claimant still must show a **prima facie** case of causation. Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter, 227 F.3d 285, 287 (5th Cir. 2000); Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281 (1994).

occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter, *supra*; O'Kelly v. Department of the Army, 34 BRBS 39, 40 (2000); Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984).

Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury arose out of employment. Hunter, 227 F.3d at 287. However, "the mere existence of a physical [or psychological] impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP, 455 U.S. 608 (1982). See also Bludworth Shipyard Inc., v. Lira, 700 F.2d 1046, 1049 (5th Cir. 1983) (a claimant must allege an injury arising out of and in the course and scope of employment); Devine v. Atlantic Container Lines, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury insufficient to shift the burden of proof to the employer).

It is well-settled that a psychological impairment can be an injury under the Act if it is work-related. Lazarus v. Chevron, USA, 958 F.2d 1297, 1299 (5th Cir. 1992); Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base, 32 BRBS 127, 129 (1997); Konno v. Young Brothers, Ltd., 28 BRBS 57, 61 (1994). Psychological impairments have included depression due to a work-related disability, Hargrove v. Strachan Shipping Co., 32 BRBS 11, 15 (1998); anxiety conditions, Moss v. Norfolk Shipbuilding & Dry Dock Corp., 10 BRBS 428 (1979); headaches, Sanders v. Alabama Dry Dock & Shipbuilding Co., 22 BRBS 340, 341-42 (1989); and stress. Marinelli v. American Stevedoring, Ltd., 34 BRBS 112, 117 (2000), *aff'd* 248 F.3d 54 (2nd Cir. 2001). Where a work-related accident has psychological repercussions it is also compensable. Tampa Ship Repair & Dry Dock v. Director, OWCP, 535 F.2d 936, 938 (5th Cir. 1976).

In the present case, Dr. Aurich, Dr. Gad, Dr. LeCorgne and Mr. Kimball diagnosed Claimant with post-traumatic stress disorder which they related to the September 1998 incident aboard the GULF ISLAND V. Dr. Gad also diagnosed Claimant with major depressive disorder which was aggravated by the September 1998 incident and contributed to the severity of Claimant's PTSD. As such, Claimant established the prerequisites for invocation of the Section 20(a) presumption.

(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." Conoco, Inc. v. Director, OWCP, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. Gooden v. Director, OWCP, 135 F.3d 1066, 1068 (5th Cir. 1998); Bridier v. Alabama Dry Dock & Shipbuilding Corp., 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered a prior, unquantifiable hearing loss); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption).

The Fifth Circuit further elaborated:

To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986). See also, Orto Contractors, Inc. v. Charpentier, 332 F.3d 283, 290 (5th Cir. 2003), cert. denied 124 S.Ct. 825 (2003) (the requirement is less demanding than the preponderance of the evidence standard); Conoco, Inc., 194 F.3d at 690 (the hurdle is far lower than a "ruling out" standard); Stevens v. Todd Pacific Shipyards Corp., 14 BRBS 626, 628 (1982), aff'd mem., 722 F.2d 747 (9th Cir. 1983) (the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); Holmes v. Universal Maritime Serv. Corp., 29 BRBS 18, 20 (1995) (the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption").

Here, Employer/Carrier successfully rebutted the Section 20(a) presumption through the testimony of Dr. Culver. Dr. Culver, a psychiatrist, examined Claimant on two separate

occasions and opined his psychological condition was not related to the September 1998 incident aboard the GULF ISLAND V. Rather, Dr. Culver attributed Claimant's current condition to the natural progression of his depression, first treated in 1995. Dr. Culver further testified Claimant's depression and anxiety in the mid-1990s was most likely the beginning stages of a schizo-affective disorder. Dr. Culver testified Claimant did not meet the criteria for post-traumatic stress disorder, thus his condition could not be the result of the 1998 offshore incident. As such, Employer/Carrier successfully rebutted Claimant's presumption.

(3) Causation on the Basis of the Record as a Whole

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers, 296 U.S. 280, 286-87 (1935); Port Cooper/T Smith Stevedoring Co., 227 F.3d at 288; Holmes, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. Director, OWCP v. Greenwich Collieries, 512 U.S. at 281.

In the present case, I find the preponderance of the evidence weighs in Claimant's favor. Employer/Carrier do not dispute Claimant experienced a stressful event aboard the GULF ISLAND V in September 1998. The weather service reported strong winds and high seas on September 9, 1998. Employer's reports referenced eighteen to twenty foot seas from Tropical Storm Frances which impacted on the hull of the vessel and caused heavy water damage. Indeed, Claimant and the rest of the crew were evacuated the day before the jack-up rig capsized, as a result of its equipment failure and the strong seas. Although Claimant referred to the storm as a "hurricane" when it actually was a tropical storm, Employer/Carrier did not submit any other evidence to rebut Claimant's rendition of the events which transpired aboard the GULF ISLAND V, in particular the call to "abandon ship," the concern and fear of the crew with respect to the impending weather system, and Claimant's own panic and belief of imminent death. As such, Claimant has established he was involved in a stressful, traumatic event in September 1998.

Claimant first sought treatment for psychological problems in March 1999. Dr. LeBouef noted Claimant suffered paranoia from water in March 1999. During the same time period, Dr. Aurich diagnosed Claimant with PTSD secondary to the September 1998 offshore incident. In June 1999, Dr. Gad diagnosed

Claimant with major depressive disorder, agoraphobia and PTSD related to the GULF ISLAND V incident. (JX-4, pp. 24-26). Mr. Kimball noted Claimant had a diagnosis of major depressive disorder, recurrent and severe with psychotic features, and PTSD, in February 2000. Dr. LeCorgne also diagnosed Claimant with PTSD following the offshore incident and major depressive disorder. Throughout Claimant's treatment with Dr. Aurich, Dr. Gad and Mr. Kimball, he consistently complained of depressed mood, anxiety, visual and audio hallucinations and flashbacks, all of which were triggered by water, boats and loud noises. Claimant's psychological condition continually worsened over time, and was not improved by psychotherapy or medication. As noted by his physicians, Claimant's mental condition prevents him from functioning, and has deteriorated to the point where bathing triggers hallucinations of the offshore incident and severe anxiety.

Dr. Culver was the sole psychiatrist who attributed Claimant's psychological condition to pre-existing depression and schizo-affective disorder. Specifically, Dr. Culver testified Claimant's delusions, paranoia and hallucinations were psychotic in nature and consistent with schizophrenia. Dr. Culver explained PTSD was not necessarily an accurate diagnosis in light of Claimant's long history of depression, insomnia and anxiety, all of which were symptoms of schizophrenia. Finally, Dr. Culver testified Claimant did not suffer PTSD as he was saddened, but not frightened, by the offshore incident. Claimant also reportedly did not have proper flashbacks to support the PTSD diagnosis.

However, I note Dr. Culver also testified anxiety and depression were overlapping symptoms of both schizophrenia and PTSD. I also find Dr. Culver's rationale in discrediting the PTSD diagnosis is grounded on incomplete information, at best. Claimant exhibited fear from the offshore incident, as evident in the many notations of fear and anxiety from water, storms, loud noises and crowds of people in Claimant's medical records. His treating mental health professionals do not mention any instance of Claimant being saddened instead of frightened by the offshore event. Moreover, Claimant's hallucinations included nightmares and visions of the jack-up rig sinking as well as the captain's call to "abandon ship." These flashbacks are directly related and of similar nature to Claimant's incident offshore.

Dr. Gad strongly disagreed with Dr. Culver's diagnosis of schizophrenia. Specifically, Dr. Gad emphasized that Claimant experienced an acute, stressful event in September 1998, after

which he rapidly deteriorated mentally to the point where he cannot function. Although Claimant had been prescribed Prozac prior to September 1998, Dr. Gad testified he was not aware of the degree of Claimant's prior depression. He explained that many family physicians in the 1990s over-prescribed Prozac, and although Claimant suffered some degree of depression he was still functional prior to the 1998 event. I also note that Claimant was not referred to a mental health professional prior to 1998 and was never actually diagnosed with an emotional disorder, aside from Dr. LeBouef's notations that Claimant complained of stress and depression. Dr. Gad testified severe PTSD may result in psychotic events such as delusions and hallucinations.

It is notable that Claimant continued to work his usual job as diesel mechanic without complaints of stress or anxiety until March 1999 when he first treated with Dr. Aurich. Although Claimant testified he refused to go offshore following the GULF ISLAND V incident, his employment records indicate he did perform two offshore jobs in the months following his traumatic event. However, I am not persuaded that this information negates Claimant's diagnosis of PTSD. Dr. Gad testified many people with depression wait up to three or four months before seeking treatment. Furthermore, the diagnostic criteria for post-traumatic stress disorder of the DSM-IV, submitted as JX-4, Exh. 9, indicates PTSD may have a delayed onset of six months or longer after the traumatic event. Although no doctor commented on the possibility of Claimant's PTSD having a delayed onset, as described in the diagnostic criteria, I nonetheless find Claimant's six months of work following his traumatic event does not contradict his PTSD diagnosis.

In balancing the entirety of the evidence of record, I find it weighs in Claimant's favor. Despite Claimant's delay in reporting psychological problems and the fact he suffered pre-existing depression, it is clear that Claimant experienced a life-threatening traumatic event after which his psychological condition rapidly deteriorated. The evidence is irrefutable that Claimant was functioning prior to September 1998, even if he had minor depression, whereas now he cannot care for himself or his family due to his many psychological problems. Dr. Culver's diagnosis of schizophrenia is unpersuasive as the symptoms he described contradict those described by Dr. Aurich, Dr. Gad and Mr. Kimball. Further, Dr. Gad contradicted the schizophrenic diagnosis, explaining severe PTSD has psychotic characteristics and Claimant experienced an acute, traumatic event. As such, I find there exists a causal nexus between

Claimant's current psychological condition and the September 1998 offshore incident which is sufficient and of the necessary substantial nature to award Claimant benefits in this matter.

In view of the foregoing and the stipulations of the parties, I find and conclude that Claimant was temporarily totally disabled from March 26, 1999 to October 9, 2000, and permanently totally disabled from October 10, 2000 to present and continuing. Thus, he is entitled to temporary total disability compensation benefits from March 26, 1999 to October 9, 2000, and permanent total disability compensation benefits from October 10, 2000, when he reached maximum medical improvement, to present and continuing, based on his average weekly wage of \$1,134.88.

B. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, 86 F.3d 438, 441, 30 BRBS 57 (CRT) (5th Cir. 1996); Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sub nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (CRT) (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can [] reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821 (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine

average annual earnings. In the present case, there is no evidence of how many days per week Claimant worked at Employer prior to the September 1998 event. While Employer/Carrier submitted earnings records which indicated Claimant regularly worked 40 hours per week, presumably a five-day worker, after the September 1998 incident, this is not the time period used in calculating Claimant's average weekly wage at the time of his injury. As the earnings records prior to September 1998 do not reveal how many days Claimant worked, I conclude Sections 10(a) and (b) cannot be applied in this case.

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990); Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra.

Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the

employment where he was injured would best adequately reflect the claimant's earning capacity at the time of the injury.

Here, the wage records of record support a finding that Claimant worked as a marine mechanic for only thirty-three weeks for the Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979) (33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979) (36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990) (34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

I conclude that because Sections 10(a) and 10(b) of the Act cannot be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

According to section 2(13), the term "wages" means:

the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. § 902(13). Fringe benefits, such as an employer's contribution to an employee trust fund, are not considered wages for the purposes of calculating average weekly wage. Morrison-Knudsen Construction Co. v. Director, OWCP, 461 U.S. 624 (1983).

Here, Claimant's earnings records indicate Employer paid him a total of \$10,605.12 for mileage expenses prior to his injury. It is not clear how the mileage payments were

calculated, but I nonetheless find the payments were reimbursement for expenses incurred while traveling to the job site, and not for services rendered by Claimant. As such, they are not included in the calculations of Claimant's average weekly wage because there is no record evidence that such reimbursements were subject to taxation or earnings. See generally, Simons v. Texas Mooring, Inc., 27 BRBS 692, 696-97 (ALJ) (Feb. 17, 1994).

Claimant was paid for a total of thirty-three weeks from his date of hire in January 1998 and his injuries in September 1998. Claimant earned a total of \$37,451.09 in regular and overtime wages during this time. Pursuant to Section 10(c) and the rationale in Miranda v. Excavation Construction Inc., *supra*, Claimant's average weekly wage shall be calculated by dividing his total earnings by the number of weeks he actually worked at Employer. As such, I find Claimant's average weekly wage at the time of his September 1998 injury is \$1,134.88 (\$37,451.09 ÷ 33).

Having concluded that Claimant sustained a psychological injury as a result of the September 1998 GULF ISLAND V incident, Employer/Carrier are responsible to Claimant for all reasonable, necessary and appropriate medical expenses related to the September 1998 event in accordance with Section 7 of the Act.

C. Section 8(f) Application

Section 8(f) of the Act provides in pertinent part:

(f) Injury increasing disability: (1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

(2) (A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . .

33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. v. Director, OWCP, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f); Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988).

1. Pre-existing permanent partial disability

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. C&P Telephone Co., *supra*. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. Id. "Disability" includes physically and mentally disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., *supra*; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-99 (5th Cir. 1977); Director, OWCP v. Potomac Elec. Pow. Co., 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979).

However, in instances where the claimant's condition is considered "normal" and can be present in a large segment of the population, the impairment is not serious enough to satisfy the

requirements of 8(f). Todd Shipyards v. Director, OWCP, 793 F.2d 1012 (9th Cir. 1986) (a pre-existing eight percent impairment based on subjective complaints not sufficient); Director, OWCP v. Berkstreser, 921 F.2d 306 (D.C. Cir. 1990) and Campbell Industries, Inc., supra (claimant's underlying degenerative disc disease not serious enough to satisfy 8(f) requirements because the conditions are common in society); Betts v. Manson Constr. & Engineering, 26 BRBS 778 (ALJ) (1993) (claimant's pre-existing "learning disability" not far from normal, thus it was not serious enough to satisfy 8(f)).

I find that the record medical evidence which pre-dates Claimant's September 1998 injury does not convey sufficient unambiguous, objective, and obvious indications of a psychological disability. The medical evidence reveals only that Claimant was prescribed Prozac by his family physician, Dr. LeBouef, for subjective symptoms of depression, stress and insomnia secondary to his work and situation with his mother and sister. (EX-8, pp. 12-17). Claimant was not referred to a mental health professional or diagnosed with a psychological condition prior to March 1999. As such, Claimant's pre-existing depressive disorder was neither obvious nor unambiguous.

Further, I find Claimant's pre-existing depression was not serious enough to satisfy the "cautious employer test." Dr. Gad testified Claimant's medical records indicate he most likely suffered some degree of depression prior to September 1998, but he could not say how severe the condition was as he only started treating Claimant in May 1999; however Dr. Gad indicated Effexor and Prozac are mild anti-depressants which were sufficient to control Claimant's moods prior to September 1998. Dr. Gad also testified family physicians widely over-prescribed Prozac in the 1990s. (JX-4, pp. 37-54). Claimant himself testified his depression was very mild and under control in the spring of 1998. (JX-2, p. 99). As such, I find it reasonable to conclude that Claimant's Prozac prescription alone is insufficient to render his pre-1998 depression a "serious disability."

Dr. Gad emphasized Claimant was able to function prior to September 1998, in that he was able to provide for his family, held a job and was outgoing in nature. (JX-4, p. 19). Despite his complaints of depression, stress and insomnia, Claimant was able to lead a normal life, albeit with the help of medication. Dr. Gad testified many people with depression are capable of functioning socially and in the workplace. Thus, I find the extent of depression Claimant suffered prior to September 1998 did not create a "greatly increased risk" of an employment-

related accident and compensation liability, thus motivating employer to terminate the employment. Rather, it is a condition which in no way affected Claimant's ability to work or expose Employer/Carrier to greater liability.

In light of the foregoing, I find Employer/Carrier failed to submit medical evidence which pre-dates Claimant's September 1998 injury and conveys a serious psychological impairment. As such, it has not established Claimant suffered a pre-existing permanent partial impairment at the time of his work-related injury in September 1998.

2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; See Eymard v. Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-68 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie v. Cooper Stevedoring Co., Inc., 23 BRBS 420, 426 (1990). Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, supra; C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 88 (CRT) (11th Cir. 1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d at 616.

I have already found Claimant's depression did not constitute a pre-existing permanent impairment. Notwithstanding that conclusion, I find the extent of his depression was manifest to the Employer at the time of his injury. The evidence does not contain any medical records that pre-date Claimant's September 1998 work-related injury which show a diagnosis for depression. However, as Employer/Carrier argues

in its 8(f) petition, Claimant's co-workers and supervisor, Mr. Blakesley, were aware Claimant took Prozac, an anti-depressant. Accordingly, I find Employer had actual knowledge of Claimant's minor depression, and this condition was manifest to Employer at the time Claimant was hired or at the time of his injury.

3. The pre-existing disability's contribution to a greater degree of permanent disability

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent total disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. See also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). If a claimant's permanent total disability is a result of his work injury alone, Section 8(f) does not apply. C&P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent total disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-17 (11th Cir. 1988).

I find that Claimant's permanent total psychological disability that occurred after his September 1998 work-related accident is due solely to this accident. Dr. Gad testified Claimant's primary diagnosis in 1999 and continuing was post-traumatic stress disorder secondary to the GULF ISLAND V incident. He explained Claimant's major depressive disorder was a differential diagnosis of PTSD and commonly overlaps with PTSD. (JX-4, pp. 78-84). Although Dr. Gad testified people who suffer a depressive episode are more likely to have future depressive episodes, he did not indicate Claimant's prior depression combined with the offshore incident to cause his PTSD.

The most persuasive statement Employer/Carrier can offer in support of this element of Section 8(f) is Dr. Gad's testimony that Claimant's prior psychological problems most likely rendered him uniquely vulnerable to a significant stressor. However, I note Dr. Gad further stated people in general have varying degrees of emotional and mental coping abilities, and

thus respond to events differently, regardless of any pre-existing emotional condition. These statements are insufficient to establish the third element of 8(f) that Claimant's minor depression contributed to the onset of his PTSD. In addition to Claimant's differential diagnosis of major depressive disorder, he suffers severe and chronic PTSD, anxiety disorder, as well as psychotic delusions and hallucinations related solely to the 1998 GULF ISLAND V incident. Dr. Gad emphasized that Claimant's primary diagnosis was PTSD, not major depression. Employer's psychiatrist, Dr. Culver, was not questioned nor did he render an opinion regarding the Section 8(f) requirements. Specifically, he did not opine as to whether Claimant's pre-existing depression or psychological condition combined with the September 1998 incident to result in his current psychological condition or whether Claimant's current psychological condition was due solely to his September 1998 incident. As the evidence does not unequivocally establish that Claimant's alleged pre-existing depression contributed to the severity of his PTSD, I find Employer/Carrier have failed to meet the third criteria of Section 8(f).

Accordingly, I find and conclude that Employer/Carrier did not establish the three pre-requisites necessary for entitlement to Section 8(f) relief under the Act. The petition for Section 8(f) relief is hereby **DENIED**.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and

Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from March 26, 1999, to October 9, 2000, based on an average weekly wage of \$1,134.88 and a corresponding compensation rate of \$756.57.

2. Employer/Carrier shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act for the period from October 10, 2000 to present and continuing, based on an average weekly wage of \$1,134.88 and a corresponding compensation rate of \$756.57.

3. Employer shall be entitled to a credit for the disability compensation paid to Claimant under the Act.

4. Employer shall reimburse Claimant for all medical expenses incurred after September 9, 1998, and pay Claimant for all future reasonable and necessary medical care and treatment arising out of his work-related injuries, to include his psychological condition, pursuant to Section 7(a) of the Act.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated as set forth above.

6. Employer's petition for Section 8(f) relief is **DENIED**.

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

ORDERED this 24th day of September, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge